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No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES H. TOMPKINS COMPANY, and J. A. JONES CONSTRUCTION COMPANY, Joint Venturers, PETITIONERS,

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC., and E. C. ERNST, INC., as Joint Venturers, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

———

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 31, 1958, in the above-styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but is appended hereto (pp. 1A-5A). The opinion of the Honorable Alexander Holtzoff, Judge of the United States

District Court for the District of Columbia, is in the form of an Order granting motions for summary judgment for Respondents and denying a motion for summary judgment by the Petitioners, and appears as Page 113 of the Joint Appendix printed for the use of the Court below, nine copies of which are filed in this Court with this Petition.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is July 31, 1958. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Where a construction contractor sublet to one subcontractor all the work required by the mechanical specifications of the prime contract, and sublet to another subcontractor all the work required by the electrical specifications of the prime contract by incorporating by reference such specifications into the respective subcontracts; and when a dispute arose as to whether certain of the specified work should be performed by the mechanical subcontractor or by the electrical subcontractor, and the contractor directed the mechanical subcontractor to perform the disputed work as a part of his subcontract and withheld from the electrical subcontractor a fund equivalent to the price of the disputed work;—does an action of interpleader or in the nature of an interpleader lie whereby the contractor may deposit into the registry of the court the fund so withheld and require the two subcontractors to interplead as to their respective obligations under their subcontracts and as to their rights to the fund so withheld?

2. Where, under the subcontracts described in Question numbered 1, each subcontractor disclaimed responsibility for the disputed work and claimed that the other one was required to perform it, and both subcontracts provided for

the settlement of disputes by arbitration, and the mechanical subcontractor demanded arbitration and the contractor thereupon demanded of both subcontractors arbitration as to which one of them was responsible for the disputed work; and when the arbiters dismissed the arbitration proceedings as to the electrical subcontractor with the statement that there was no evidence of a dispute between him and the contractor and then absolved the mechanical subcontractor; and when the electrical subcontractor subsequently demanded arbitration, and the second panel of arbiters resolved that the prior award did not prevent them from deciding the dispute on its merits and then absolved the electrical subcontractor; and when these awards were pled by the subcontractors as to bar to an action against them by the contractor in interpleader;—were not these awards in arbitration on their face unresponsive to the questions submitted to the arbiters and in excess of their powers and should not the court have reviewed them when pled in such an action and have set them aside?

3. Under the facts stated in Question numbered 2, where the contractor after the initial award in arbitration, on the theory that the release of the mechanical subcontractor placed the responsibility on the electrical subcontractor, made payments to the mechanical subcontractor as for the disputed work but after the second award in arbitration credited the partial payments on the amount due to the mechanical subcontractor on his original subcontract and continued to withhold from the electrical subcontractor a fund equivalent to the price of the disputed work;—did not these actions of the contractor amount to an unsatisfied Accord and as such constitute no bar to an action in interpleader against both subcontractors to determine their respective obligations for the disputed work and their rights to the fund so withheld?

To each of the above questions the District Court and

the Court of Appeals have reached a negative answer. It is submitted that such decisions are contrary to the decisions of other United States Courts of Appeals and to decisions of this Honorable Court.

STATUTES AND REGULATIONS INVOLVED

There are no pertinent statutes or regulations involved in this matter.

STATEMENT OF THE CASE

Petitioner is a joint venture general construction contractor who entered into a lump sum contract with the Corps of Engineers, U. S. Army, for the construction of an operations building and appurtenant facilities on National Security Administration construction site, Fort Meade, Maryland, on June 22, 1954. However, as is the practice of every general construction contractor, prior to entering into this particular contract, Petitioner received bids or quotations from each of the Respondents, among some 70 other prospective subcontractors or vendors for this large construction undertaking. Respondent Lloyd E. Mitchell, Inc. (hereinafter for brevity called the mechanical subcontractor) offered to perform all of the work described in the Government plans and specifications as mechanical work for and instead of Petitioner and Respondent, Harry Alexander, Inc. (who afterward associated the E. C. Ernst, Inc. with it as a joint venturer) (hereinafter for brevity called the electrical subcontractor) offered to perform all of the work described in the Government plans and specifications as electrical work for and instead of Petitioner.

In conformity with the respective bids or quotations of the mechanical and electrical subcontractors, Petitioner entered into subcontracts with each of the Respondents, incorporating by reference in each such subcontract, the sections of the Government plans and specifications appli-

cable to each subcontractor's work specialty. Such is the practice of the industry and is in no wise unique to this particular Government contract.

Respondent Mitchell, the mechanical subcontractor, had a subcontract bearing date of 2 July 1954 which provided that such subcontractor was to perform for and on behalf of Petitioner, in accordance with its bid, all of the so-called mechanical work required by the Government plans and specifications. This subcontract was for the lump sum of $4,078,500. Respondent Alexander-Ernst, the electrical subcontractor, had a subcontract bearing date of 9 July 1954 which provided that such subcontractor was to perform for and on behalf of Petitioner, in accordance with its bid, all of the so-called electrical work required by the Government plans and specifications. This subcontract was for the lump sum of $3,825,000. Each of the subcontracts provided, in Article VIII thereof, for the settlement of disputes by arbitration and that, pending such settlement, the subcontractor should proceed with the work as directed (Joint Appendix pp. 14 and 53).

During the performance of the subcontracts a dispute arose as to which one of the two subcontractors was required, under its subcontract, to furnish and install certain of the specified work designated as "motor control devices". (Described more fully in Joint Appendix p. 4.) More particularly the dispute was as to whether the motor control devices were required by the mechanical or by the electrical specifications. With notice to the electrical subcontractor, the Respondent Alexander-Ernst, the Petitioner directed the mechanical subcontractor, the Respondent Mitchell, to perform the disputed work subject to arbitration. Mitchell complied with the direction and entered into performance of the disputed work, but demanded arbitration as to his contractual liability therefor, stating in his demand, in part:

"The owner or Contracting Officer does not have

jurisdiction over such disputes since they all involve a determination whether certain work and materials are to be *performed and furnished by us, or by the electrical subcontrator.*" (Underscoring supplied) (Joint Appendix p. 21).

Thereupon the Petitioner demanded of both Respondents the arbitration in one proceeding of the question as to which one of them was obligated to perform the disputed work and stated in such demand, in part:

> "Since the parties agree that all of the disputed work is required under the prime contract and that each item thereof is required either under the mechanical subcontract or under the electrical subcontract, depending upon the relevant sections of the prime contract; what portions of the disputed work is the electrical subcontractor—Alexander-Ernst—obligated to perform? (Joint Appendix p. 25).

Thus the sole question submitted to the arbiters was: whether the disputed work was required by the mechanical or by the electrical subcontract. In their award, however, the arbiters failed to pass upon this question. Instead, they dismissed the proceedings as to the electrical subcontrator upon the alleged ground that there was no evidence of a dispute between him and the Petitioner, and then held that the mechanical subcontractor was not required to perform the disputed work (Joint Appendix p. 47).

In view of the question to be arbitrated, namely, whether the mechanical or electrical subcontractor was to perform the work, when the arbitration award determined that it was not the duty of the mechanical subcontractor to perform the work, the Petitioner presumed that the decision meant that the electrical subcontractor was required to perform the work under his subcontract, and hence deducted an amount of money equal to the value of the work in dispute from payment otherwise due the electrical sub-

contractor. The electrical subcontractor thereupon demanded arbitration under the terms of his subcontract on 14 March 1957 (Joint Appendix p. 87). On its face, the question submitted to the second arbitration panel was identical to the question submitted to the first one, namely: Was the work in question to be performed by the electrical subcontractor as could be inferred from the first arbitration decision, or was the first panel incorrect in their conclusion. Award of this second panel was made on 25 June 1957 (Joint Appendix p. 94) holding:

(1) That in spite of the previous arbitration award it was not precluded from deciding the present dispute on its merits, and

(2) That is was not the obligation of Alexander-Ernst (the electrical subcontractor) to perform the disputed work.

The result of the two Awards, taken together, is to hold that while the two subcontracts together encompass the disputed work it is not included in either of them. This position is absurd on its face and cannot be supported logically or rationally.

In this situation Petitioner is the holder of a fund equivalent to the value of the disputed work. The mechanical subcontractor has performed the work. If he was required by his subcontract to perform the work he has no valid claim to the fund. In that event the electrical subcontractor is entitled to it. On the other hand, if the electrical subcontractor was required by his subcontract to perform the disputed work he has no valid claim to the fund. For in that event the mechanical subcontractor has performed the disputed work which the electrical subcontractor was bound to perform and is entitled to the fund as a payment in addition to his own subcontract.

Since the parties were not able to settle the dispute, by

arbitration or otherwise, Petitioner filed against both Respondents this action in interpleader, in which he prayed to be permitted to deposit into the Registry of the Court the fund which he held, and that the Respondents be required to interplead as to their respective obligations for the performance of the disputed work and their respective rights to the money.

The District Court held that an action in interpleader did not lie, declined to review the regularity of the arbitration proceedings and rendered summary judgment for both Respondents (Joint Appendix p. 113). The Court of Appeals affirmed the judgment of the District Court (Appendix to this Petition pp. 1A-5A).

REASONS FOR GRANTING THE WRIT

Does the Action in Interpleader Lie?

The authorities seem to justify an affirmative answer to this question. These authorities are collected in the Annotation in 70ALR 515-518. The Annotation reads in part as follows:

> "For the purposes of this annotation, it is assumed that all the formal requisites of a bill of interpleader have been complied with. In addition, 'bill of interpleader' as used in this title is taken to include bills in the nature of a bill of interpleader.
>
> "It is generally held that, where there is a dispute between the contractor and lien claimants and others in respect of funds due under a construction contract and still in the hands of the owner, the owner, being willing and anxious to pay the amount due, may maintain a bill of interpleader against such persons for the purpose of determining their respective rights in the fund."

(numerous State Court citations).

Here, the matter is one step removed, namely, that of

the construction contractor (Petitioner) holding the fund against one or the other of two subcontractors. The amount of the disputed work involved is $77,636, and the Petitioner is willing to deposit such amount into court for payment as justice may require. Petitioner should not be required to pay for the work twice. Petitioner admits that at the initiation of the dispute, it was his opinion that the work was encompassed by the mechanical subcontract (Joint Appendix pp. 63-70) but the first arbitration panel seemed to have determined otherwise (Joint Appendix pp. 83-84). However, such opinion or decision on the part of Petitioner would not be sufficient to defeat an action in the nature of interpleader because this Honorable Court has held that where there is more than one adverse claimant to a fund, threatening potential adverse claims, interpleader is an appropriate remedy. (*State of Texas* v. *State of Florida*, 306 U. S. 398, 83 L. Ed. 817). When the award of the first panel arbitrators was announced, Petitioner presumed the obligation was that of the electrical subcontractor and, in default of performance by him, deducted an amount of money equal to the value of the work from his account. The situation of Petitioner is practically identical to that reported in the *Packard* v. *Stevens case*, 58 N. J. Eq. 489, 46 Atl. 250, where several contracts had been awarded to several different contractors to fill in an island. Compensation was to be made by the number of cubic yards of material deposited. The contractors confused their deposits so that the amount due each was in dispute, and it was held that the owner, who was willing and anxious to pay for the whole contract, was entitled to maintain a bill of interpleader to have the rights of each of the contractors in the fund determined. Here, the Petitioner, as prime-contractor-owner has certain work to be performed for him by one of two subcontractors, and the equitable remedy of interpleader, to avoid a multiplicity of suits, and to place all interested parties before the court in a single action, so that a determination may be made which is binding upon all parties, should lie.

Should the Court Review the Arbitration Awards?

Judicial review of arbitration decisions has been recognized by this Honorable Court as an essential process in the pattern of judicial remedies. In the historically important case of *Davy's Executor's* v. *Faw*, 11 U. S. 171, 3 L. Ed. 305, Chief Justice Marshall stated:

> "That the injured party may avail himself of this defense in a court of law, where the excess of power is apparent on the face of the award, is not controverted."

It is submitted, therefore, that the failure of the District Court and the Circuit Court of Appeals to at least review the two separate awards under arbitration in this case was contrary to the decisions of this Honorable Court and those of certain other Circuit Courts of Appeal. In fact, under a different set of circumstances, the Court of Appeals for the District of Columbia did permit judicial review of an arbitration decision. (In *Campbell* v. *Campbell*, 44 App. D. C. 142—Certiorari denied 242 U. S. 642, 61 L. Ed. 542, it was held that even though a matter in litigation was withdrawn and submitted to arbitration, this still did not necessarily determine the validity of the award.) Under the particular facts in that case, the Court of Appeals held that the discontinuance of a pending suit and its submission to arbitration left open to the Plaintiff the remedy of an independent action to vacate the award.

This Honorable Court refused to review another leading case on the subject of judicial review of arbitration awards in the *Texoma Natural Gas Co.* v. *Oil Workers I. U.*, 58 F. Supp. 132, 146; 324 U. S. 872, 89 L. Ed. 2004, where it was stated:

> "(1) THE COURT'S FUNCTION. The arbitration was not in accordance with either the state or federal statute governing arbitrations. It was *under the contract*, and, therefore, was one at common law. The terms of the submission are the relevant portions of

> the contract, and those portions are appropriate for construction by a court of competent jurisdiction, just as are all other provisions of the contract. If the matters determined are not within the terms of the submission (i.e. within the arbitration provisions of the contract) or the arbitrators in their award go beyond the contemplation of the parties, as reflected in the contract, they obviously exceed their jurisdiction, and their award may be set aside in an appropriate proceeding."

and further:

> "Upon entry of the arbitration award, the Company was entitled to a judicial determination of its rights and the validity of the award in a court of competent jurisdiction. This court is an appropriate tribunal for that determination."

To this same effect is the case of *Goodall-Sanford, Inc.* v. *United Textile Workers of America*, 223 F. (2d) 104.

In the case at bar the work required by the mechanical specifications of the prime contract was embraced in one subcontract and that required by the electrical specifications was embraced in the other subcontract. The two subcontracts, therefore, encompassed all the mechanical and electrical work. A dispute arose as to whether certain of the specified work was required by the mechanical specifications or by the electrical specifications. Each subcontractor claimed that the disputed work was not included in his subcontract, but was required by the specifications for which the other one had assumed responsibility.

Both subcontracts provided that pending the settlement of a dispute the subcontractor should proceed with the work as directed by the contractor. With notice to the electrical subcontractor, Petitioner directed the mechanical subcontractor to proceed with the disputed work pending arbitration. The mechanical subcontractor complied but subsequently demanded arbitration as to his contractual responsibility for the work in question. Thereupon Pe-

titioner demanded of both subcontractors the arbitration of the dispute which, in essence, was: Which one of the two subcontractors was required to perform the disputed work?

The Arbiters, to whom the question was submitted, dismissed the proceedings as to the electrical subcontractor with the statement that there was no evidence of a dispute between that subcontractor and Petitioner, and then absolved the mechanical subcontractor from contractual responsibility for the disputed work. Thus the Arbiters avoided the question presented to them. (Joint Appendix pp. 83, 84).

Questions Submitted: (Joint Appendix p. 21) (By Respondent Mitchell)

> "* * * whether certain work and materials are to be performed and furnished by us or by the electrical subcontractor."

And the Petitioner's Demand for Arbitration of 25 June 1956 (Joint Appendix p. 25) put the question:

> "A-2. Since the parties agree that all of the disputed work is required under the prime contract and that each item thereof is required either under the Mechanical subcontract or under the Electrical subcontract, depending upon the relevant Sections of the prime contract: what portion of the disputed work is the Electrical subcontractor, Alexander Ernst, obligated to perform?"

Award of Arbitrators: (Joint Appendix p. 47)

> "1. * * * and the motion of ALEXANDER ERNST to be dismissed as a party, to this arbitration is granted."
>
> "2. That it is not the contractual obligation of Lloyd E. Mitchell, Inc. under the above described subcontract to furnish or install any of the work * * *."

When the Petitioner withheld from the electrical subcontractor a fund equivalent to the price of the disputed work, the electrical subcontractor demanded arbitration as to his contractual responsibility for the disputed work. However stated, the question in dispute still was: Which of the two subcontractors was responsible for the work in question? The second panel of Arbiters made an award in which they resolved that the prior award did not prevent them from deciding the dispute on its merits and that the electrical subcontractor was not responsible for the disputed work.

Questions Submitted: (Joint Appendix p. 90) (By Respondent Alexander Ernst)

"(a) and (b) * * * may the Contractor now create a dispute on the same facts in regard to the same items of work?

and

"(c) In view of items (a) and (b) above, may the Contractor under the terms of the subcontract, or under the terms of any existing laws or regulations, arbitrarily withhold monies due the Subcontractor, with no justification except the reiteration of a dispute previously decided and rejected?"

And your Petitioner presented the same question as the prior arbitration: (Joint Appendix pp. 92, 93)

"It is submitted that Paragraph 1 of the Award of Arbitrators dated 20 November 1961 and designated as Case No. C-12253, WASH C-156 holding that there was no dispute between Tompkins-Jones and Alexander-Ernst and dismissing Alexander Ernst as a party, implied by such decision that the furnishing and installation of work called for in items 1 through 13 *must* be an obligation of Alexander Ernst as the electrical subcontractor, since such work was not included within the specific terms of the Lloyd E. Mitchell, Inc. mechanical subcontract * * *."

Award of Arbitrators: (Joint Appendix, p. 94)

> "1. That the prior arbitration award dated November 20, 1956 in the Matter of the Arbitration between Tompkins-Jones and Lloyd E. Mitchell, Inc. and Alexander Ernst, Inc., does not preclude the present panel of arbitrators from deciding the dispute presented in the present proceeding on its merits.
>
> "2. That, it is not the obligation of Alexander-Ernst, under its subcontract with Tompkins-Jones, to furnish or install any of the work * * *".

Faced with this failure of arbitration to settle the dispute Petitioner applied to the United States District Court for relief in an action for interpleader. The District Court refused to examine the awards to determine whether they were responsive to the questions submitted to arbitration. The United States Court of Appeals assumed the awards were binding without examining them. Since the two awards cannot be supported on any logical or rational basis they should be set aside and the case proceed to a determination of the issues between the parties.

Was the With-Holding of the Fund Justified?

In urging an affirmative reply to this question, Petitioner would point to the maxim in legal usage that parties must give a practicable, workable interpretation to any document in dispute and not make an arbitrary interpretation which would lead to litigation. Accordingly the Petitioner sought to give effect to the first Award in arbitration by making payments to Respondent Mitchell for the disputed work and withholding the equivalent of such payments from Respondent Alexander-Ernst. However, when the Award in the second arbitration was announced Petitioner had no alternative but to credit the payments which it had made to the Respondent Mitchell for the disputed work against his subcontract and apply to the United States District Court for help in settling the dispute.

The initial agreement of Petitioner to abide by the first Award may be said to be an Accord to pay to the mechanical subcontractor the amount of his subcontract and also an additional amount for the disputed work. When after the second award and prior to complete payment under the Accord, Petitioner credited the partial payment made to the mechanical subcontractor for the disputed work on the amount due him under his subcontract, the Accord failed of satisfaction. Hence the unsatisfied Accord is no bar to the action.

The doctrine laid down in the case of *Texas* v. *Florida*, 306 U. S. 398; 83 L. Ed. 817, on interpleader has been followed by Circuit Courts of Appeals (other than the United States Court of Appeals for the District of Columbia Circuit) in numerous instances, permitting interpleader to quell the fear of vexatious litigation.

In the 5th Circuit in the case of *U. S.* v. *Munn*, 105 F. (2d) 578 (July 15, 1939) a surety was permitted to interplead some 70 claimants, even though the "fund" was not equal to the total of the possible claims; even though the surety had a pecuniary interest in the outcome of the litigation; and even though the claims did not have a common source. Some 16 years later, this same circuit, in the case of *Clyde Austin, et al.* v. *Texas-Ohio Gas Co.*, 218 F. (2d) 739 (February 2, 1955) permitted the use of interpleader as a remedy to forestall litigation on various numerous stock claims.

In the 8th Circuit, the case of *Hunter* v. *Federal Life Ins. Co., et al.*, 111 F. (2d) 551 (May 8, 1940) the Court permitted a "stakeholder" acting in good faith, to maintain a suit in interpleader for the purpose of ridding himself of vexatious and expensive resistance of adverse claims, even though he believed that only one of the possible claims was meritorious.

In the 10th Circuit, in the case of *Holcomb* v. *Aetna Life Ins. Co.*, 228 F. (2d) 75 (August 3, 1955) writ of certiorari

denied 3/12/56, 76 S. Ct. 473, the Court held that a Federal Court may enjoin litigation in a state court proceeding under the terms of 28 USCA 1335 where an appropriate action of interpleader is brought in such Federal Court.

This Honorable Court clearly set forth the doctrine to be followed on Page 407 of the *Texas* v. *Florida* decision, *supra:*

> "While in point of law or fact only one party is entitled to succeed, there is danger that recovery may be allowed in more than one suit. Equity avoids the danger by requiring the rival claimants to litigate before it the decisive issue, and will not withhold its aid where the plaintiff's interest is either not denied or he does not assert any claim adverse to that of the other parties, other than the single claim, determination of which is decisive of the rights of all. * * *"

It is submitted that the decisions of the District and Circuit Court of Appeals in this case are clearly conflicting with the principles announced in the *Texas* v. *Florida* decision, *supra,* and with the broad principles announced in the 5th, 8th and 10th Circuits cited above. Future litigants invoking the equitable principles of interpleader to avoid vexatious litigation should have a pronouncement from this Honorable Court consistent with the liberal Circuits above cited assuring them of judicial consideration of their legal difficulties.

CONCLUSION

The great volume of contracts written thoughout the United States renders the issues in this case of primary importance. The settlement of disputes by arbitration has greatly relieved Courts of their overcrowded dockets. But unless the process of arbitration is reviewable in the Courts, serious injustices may result. Arbiters are bound to decide the precise question submitted to them. In this case, the Petitioner had a contract right to require certain work to be performed by one of two subcontractors. The

question of which one of two was bound to perform the work was submitted to arbitration by agreement of the parties. The arbiters have, in effect, by their awards, re-written the two subcontracts so that Petitioner may not require the work from either one of the subcontractors. The result is that, without judicial relief, Petitioner must pay for the same work twice. This is a patent injustice. The time honored equitable remedy of interpleader seems an appropriate one by which the issues in this case may be decided. For these reasons, and for the reason that it is sincerely believed that the decisions below are in direct conflict with the spirit and intent of decisions of this Honorable Court and other Circuit Courts of Appeals, it is respectfully requested that this case be reviewed by the Supreme Court and the judgments of the Courts below be reversed.

Respectfully submitted,

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Appendix to Petition for Writ of Certiorari

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,280

CHARLES H. TOMPKINS COMPANY, and J. A. JONES CONSTRUCTION COMPANY, Joint Venturers, APPELLANTS

v.

LLOYD E. MITCHELL, INC., and HARRY ALEXANDER, INC., and E. C. ERNST, INC., as Joint Venturers, APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided July 31, 1958

Mr. O. P. Easterwood, Jr., with whom *Mr. Alan Johnstone* was on the brief, for appellants.

Mr. Howard H. Conaway, of the bar of the Court of Appeals of Maryland, *pro hac vice*, by special leave of Court, with whom *Mr. Milton M. Gottesman* was on the brief, for appellee Lloyd E. Mitchell, Inc.

Mr. Nicholas J. Chase, with whom *Mr. Robert W. McChesney, Jr.*, was on the brief, for appellees Harry Alexander, Inc., and E. C. Ernst, Inc.

Before WHITAKER, Judge, United States Court of Claims,* and WILBUR K. MILLER and BAZELON, Circuit Judges.

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* Sitting by designation pursuant to the provisions of Section 291(a) of Title 28, United States Code.

WILBUR K. MILLER, *Circuit Judge:* Charles H. Tompkins Company and J. A. Jones Construction Company were, as joint venturers, the general contractor on a large construction project. By separate subcontracts, they engaged Lloyd E. Mitchell, Inc., to do the mechanical work required by the plans and specifications, and Harry Alexander, Inc., and E. C. Ernst, Inc., joint venturers, to do the electrical work required thereby.

In the course of construction, a dispute arose between Tompkins-Jones and Mitchell as to whether the latter's subcontract required it to perform certain items of work included in the general contract. Mitchell denied the obligation and demanded arbitration as provided in its subcontract, but in the meantime proceeded with performance of the disputed items as its subcontract stipulated it should do, upon request, pending resolution of the controversy. Tompkins-Jones agreed to the arbitration proceeding, and attempted to make Alexander-Ernst parties thereto, over the latters' protest.

Arbitration was held. The arbitrators dismissed Alexander-Ernst as parties on the ground there was no evidence of a dispute between them and Tompkins-Jones. They found it was not Mitchell's contractual obligation to do the disputed work, and directed Tompkins-Jones to pay Mitchell the actual cost of labor and materials used in performing it pursuant to Tompkins-Jones' demand.

Tompkins-Jones agreed to comply with the arbitration award and requested Mitchell promptly to complete not only its subcontract but also the work about which arbitration had been held. Mitchell did so and, as it performed the extra work, it sent invoices therefor (with trifling exceptions not pertinent here), which Tompkins-Jones paid.

About two months after the award, Tompkins-Jones informed Alexander-Ernst that they—not Mitchell—were contractually obliged to do the disputed work. Alexander-Ernst denied the obligation and demanded arbitration of

which Tompkins-Jones agreed. After a hearing, the arbitrators decided it was not the obligation of Alexander-Ernst under their subcontract to perform the items of work in dispute.

Although the two arbitration awards had determined that neither subcontractor was contractually obligated to do the work in dispute, and although it had paid Mitchell the sum of $77,636 for performing it as required by the first award, Tompkins-Jones then withheld that sum from moneys due Mitchell and a similar sum from funds due Alexander-Ernst under their subcontracts. They then filed this action in interpleader against both subcontractors, asking the court to decide which was required by its subcontract to do the disputed work and which was entitled to be paid for it.[1]

Mitchell relied upon the first arbitration decision as conclusive that its subcontract did not include the disputed items, alleged that it had been paid therefor quite apart from its subcontract, and said it did not claim the witnheld money as compensation therefor. Alexander-Ernst relied upon the second arbitration decision as conclusively absolving them from any contractual obligation to perform the work in dispute, and disclaimed any right to the withheld money growing out of that work.

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[1] This action by appellants is thus described by them in their brief:

> "Appellant thereupon charged the payments which it had made for the disputed work to appellee Mitchell against the price of its subcontract and established a reserve in like amount against the subcontract price of Alexander-Ernst and filed action in the United States District Court for the District of Columbia seeking to interplead the two subcontractors so that a determination could be made by the Court as to which of them was required under its subcontract to perform the disputed work, and which one was entitled to the fund which appellant held as for the price of the disputed work."

Summary judgment went for the two subcontractors, from which Tompkins-Jones appeal. They assert, as they did in the District Court, that the disputed work fell within the scope of one of the two subcontracts, and that in paying Mitchell for its performance, they had in effect made a payment on the price of one or the other of the two subcontracts.

The argument ignores the fact that Tompkins-Jones were bound by the two arbitration awards, which held that neither subcontractor was obligated to do the disputed work. Although they had paid Mitchell for performing it, they apparently reasoned that, since the items were embraced in the general contract, they were included in one or the other of the two subcontracts, despite the decisions of the arbitrators. Because of this erroneous assumption, they created what was in fact an artificial fund in hand with fictional adverse claimants thereto, by withholding an amount equal to the cost of the extra items from moneys due under each of the subcontracts. In these circumstances, interpleader did not lie.

Moreover, the facts developed in the evidence conclusively show, not only that an action in interpleader was improper, but also that the appellants were not entitled to any other sort of relief, so Rule 54(c), Federal Rules of Civil Procedure,[2] does not apply. The situation simply is

[2] The Rule is as follows:

"(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

that Tompkins-Jones had to bear the cost of the disputed items which were within the terms of their general contract, but have been authoritatively determined not to be embraced in either subcontract.

Affirmed.